

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of San Joaquin
(County File No. 03-ACP-SJ-01/02)

Administrative Docket No. 113

DECISION

Hawke Ag Aviation, Inc.
P.O. Box 1133
Oakdale, California 95361

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners may levy a civil penalty up to \$1,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the San Joaquin County Agricultural Commissioner found that the appellant, Hawke Ag Aviation, Inc., violated 3 CCR section 6614(b)(2). The commissioner imposed a penalty of \$500 for the violation.

Hawke Ag Aviation, Inc., appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation in regard to the section 6614(b)(2) violation. The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using his independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides them on the record before the Hearing Officer. In reviewing the record, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are in the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the findings and decision, the Director affirms the decision.

3 CCR section 6614(b)(2)

Section 6614(b)(2) provides that no pesticide application shall be made or continued when there is a reasonable possibility of damage to nontarget crops, animals, or other public or private property.

Hawke Ag Aviation, Inc.'s representative, Mr. Shane Sperry, stipulated that on June 13, 2000, Hawke Ag Aviation, Inc., made an aerial application of Propanil 4, a restricted-use pesticide, to Mr. Steve John's rice field, site 1-1C. There is information in the record that on June 20, 2000, Mr. Manuel Da Silva filed a complaint with the San Joaquin Agricultural Commissioner's office regarding apparent herbicide damage to his clover field. Mr. Da Silva's clover field is located directly south of Mr. John's rice field. The damage in the clover field was reported as marginal leaf burning on some of the clover plants. The leaf burning was heaviest in the northern part of the clover field closest to Mr. John's rice field. There is information in the record that the wind speed at the nearby Escalon station was three to four miles an hour steady, with gusts up to nine miles per hour. The direction of the wind was from north to south (from the direction of the rice to the clover).

On June 23, 2000, Mr. Tom Watkins, Senior Agricultural Biologist with the San Joaquin County Agricultural Commissioner's office, took three foliage samples from Mr. Da Silva's clover field and two foliage samples from Mr. John's rice field. The California Department of Food and Agriculture, Center for Analytical Chemistry (Lab), performed the analyses of the samples. The Lab's analyses found the three clover samples to have 0.36 parts per million (ppm), 2.30 ppm and 9.76 ppm of propanil, the active ingredient in the pesticide, Propanil 4. Mr. John's two rice field samples showed 112.50 ppm. and 47.70 ppm of propanil. There is information in the record that the sampling results and patterns are consistent with drift.

There is information in the record that the clover had been contaminated with measurable amounts of propanil. The clover was to be used to feed Mr. Da Silva's dairy cattle. There is information in the record that the U.S. Environmental Protection Agency had not established a tolerance level for propanil residue on clover. There is also information in the record that the clover could not be fed to the dairy cattle without prior consultations with a chemical analytical laboratory and a veterinarian. Therefore, the application of Propanil 4 did cause damage to Mr. Da Silva.

The appellant contends that the lengthy time period for the proposed violation to be issued did not allow Hawke Ag Aviation, Inc., the opportunity to collect samples on behalf of Hawke Ag Aviation, Inc. The application of Propanil 4 took place on June 13, 2000. The damage to the adjoining clover crop was reported on June 20, 2000. The violation notice was issued on July 11, 2001. On February 22, 2002, the Notice of Proposed Action was served on the appellant. Anytime after the violation notice was issued, the appellant could have reviewed the evidence in this case, including any sampling protocol and the sampling results. Furthermore, FAC section 13000 provides that any action shall be commenced by the commissioner within two years of the occurrence of the violation. Therefore, the issuance of the violation notice and the Notice of Proposed Action was timely.

The appellant also contends that the samples taken from Mr. Da Silva's and Mr. John's fields were "suspect and inconclusive in that the manner that they were collected and the results that are shown." There is sufficient information in the record to contradict the appellant's allegation, and the appellant offered no evidence at the hearing that would support this contention.

A reasonable inference from the information in the record is that the appellant's Propanil 4 application was made when there was a reasonable possibility of damage to the non-target clover crop.

Conclusion

The record shows the commissioner's decision is supported by substantial evidence, and there is no cause to reverse or modify the decision.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the total \$500 penalty.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

STATE OF CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION

By: original signed by Dated: November 20, 2002
Paul Helliker
Director